Office-Supreme Court, U.S.
FILED
AUG 19 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-206, 82-229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner,

v.

CARL W. STOTTS, *et al.*,
Respondents.

MEMPHIS FIRE DEPARTMENT, ROBERT W. WALKER, CITY OF MEMPHIS AND JOSEPH SABATINI,
Petitioners,

v.

CARL W. STOTTS, *et al.*,

and

FRED L. JONES,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

This brief amicus curiae of the Equal Employment Advisory Council ("EEAC") is submitted with the consent of the parties [1] in support of the petitioners.

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[1] Their consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) as well as other equal employment statutes and regulations. As such, they have a direct interest in the issue presented for the Court's consideration in the instant case—*i.e.*, whether a court has the authority to modify a consent decree, which is silent with regard to layoffs, by overriding a bona fide seniority system which provides for layoffs by seniority, where the modification is opposed by the employer and the union and where there has been no judicial finding of discrimination.

EEAC is particularly concerned about the seniority issues raised herein. Seniority systems are prevalent not only within numerous state public employment schemes, but throughout American industry as well.[2]

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[2] Since passage of the Wagner Act in 1935, seniority provisions, including layoff policies, have been a mandatory subject

EEAC's members, as major employers of the nation's work force, have a substantial interest in helping to reinforce and ensure the validity of these seniority systems. Accordingly, because of its interest in issues involving the interpretation of Section 703(h) of Title VII, which immunizes from Title VII liability neutral, bona fide seniority systems, EEAC has filed briefs as amicus curiae with this Court in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); and *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). In addition, EEAC filed an amicus brief in *Firefighters v. Boston Chapter, NAACP*, 51 U.S.L.W. 4566 (U.S. May 16, 1983), which this Court remanded for consideration of mootness.

STATEMENT OF THE CASE

This case involves a challenge to an order which had the effect of overriding the "last hired, first fired" seniority system of the Memphis Fire Department. The order modified the terms of a consent decree entered in 1980 and ostensibly was designed to prevent the erosion of progress under the 1980 consent decree and an earlier consent decree entered

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of collective bargaining. 29 U.S.C. § 151 (1973), construed in *United States Gypsum Co.*, 94 N.L.R.B. 112, 114 (1951); *Hilton Mobile Homes*, 115 N.L.R.B. 873 (1965). This Court has noted that seniority provisions "are universally included in these contracts." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977).

in 1974. In order fully to understand the posture of this case, it is necessary to consider the intent and effect of both the 1974 and the 1980 consent decrees, as well as the layoffs that gave rise to the instant case.

The 1974 consent decree arose out of a lawsuit filed by the United States Department of Justice alleging a pattern or practice of discrimination in employment against blacks in the Memphis Fire Department and various other city divisions.[3] The consent decree was approved and entered by the United States District Court for the Western District of Tennessee. The City adopted "as its long term goal in this decree, subject to the availability of qualified applicants, the goal of achieving throughout the work force proportions of black and female employees in each job classification, approximating their respective proportions in the civilian labor force" (J.A. 101). As a means of achieving this long term goal, the consent decree contained an interim goal of increasing the level of black employment in the uniform positions of the Fire Department by five percent (5%) by June 30, 1976 (J.A. 105). Achievement of the goals of the decree expressly were made subject to anticipated budget vacancies. *Id.*, at 105. With regard to the Fire Department, no specific numerical goals were to be established unless the City failed to meet the above goal of increasing black employment by five percent (5%). The decree did not establish specific numerical goals for any rank above firefighter, but acknowledged the need to increase the number of blacks in the supervisory rank. *Id.*, at 107.

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[3] The 1974 consent decree is set forth in the Joint Appendix ("J.A.") at 98-115.

The 1974 consent decree contained no finding of discrimination on the part of the City, and the City expressly denied that it had engaged in any pattern or practice of discrimination (J.A. 99). The decree provided that for purposes of promotion, transfer and assignment, total or City-wide seniority would be considered (J.A. 103). Finally, the 1974 consent decree was silent with regard to layoffs, reductions in rank and recall rights, and "constructive" seniority was not awarded to any alleged victims of the City's practices.

On February 16, 1977, Carl Stotts, a black employee of the Fire Department, filed a class action suit alleging that the Fire Department's hiring and promotion practices violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. §§ 1981 [4] and 1983 [5] (J.A. at 8). On June 19, 1979, Fred Jones, a black employee

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[4] 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[5] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

of the Fire Department, filed an individual action alleging a denial of a promotion because of his race (J.A. 15). The *Stotts* and *Jones* cases were consolidated. On May 6, 1980, a second consent decree was approved and entered by the district court (App. 59-69).[6]

The 1980 consent decree pertained solely to the Fire Department and was "not intended to conflict with any provisions" of the 1974 decree, but rather was intended to "parallel and supplement" the earlier decree (App. 60). The 1980 decree adopted the long term goal of the 1974 decree, and established an interim hiring goal of filling fifty percent (50%) of all vacancies with blacks, and a promotional goal of twenty percent (20%) (App. 64-65). The decree expressly stated that the City did not "admit any violations of law, rule, or regulation with respect to the allegations made by plaintiffs in their complaints." *Id.*, at 60. The decree also provided that:

> Both plaintiffs and the class they represent shall seek no further relief for the acts, practices or omissions alleged in the complaints save to enforce the provisions of this Decree, thereby waiving the right to seek further relief. (App. 61).

Like the 1974 decree, the 1980 decree contained no provision regarding layoffs, reductions in rank or recall rights, and no class member was granted retroactive seniority.

In May 1981, the City announced layoffs in all divisions of the City government, including the Fire Department. The layoffs were necessitated by a deficit in the City's projected operating budget. The lay-

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[6] "App." refers to the Appendix to the petition for a writ of certiorari filed herein by the City.

off policy adopted by the City was based on city-wide seniority and was consistent with the Memorandum of Understanding entered into by the City and Local 1784 of the International Association of Firefighters (hereinafter "the Union" or "Local 1784").[7] Under the layoff policy, employees whose positions were to be eliminated could "bump" employees in lower ranking positions with less seniority. The result of the policy was that employees in the Fire Department with the least seniority would be laid off.

On May 4, 1981, Stotts and Jones obtained a temporary restraining order preventing the layoff or reduction in rank of minority employees of the Fire Department (J.A. 23). On May 5, 1981, with the consent of the parties, the Union was granted intervention (J.A. 24). Following a hearing held on May 8, 1981, the district court orally announced its decision to enter a preliminary injunction (App. 72-76). In so doing, the court found that neither the 1974 nor the 1980 consent decrees contemplated what method would be used for a reduction in rank or layoff (App. 73). In addition, in its oral ruling, the court stated:

> I do find that the adoption of this layoff policy was not adopted with the intent or specific purpose to discriminate against black[s], and I find no reason—well, neither the layoff nor the policy adopted was intended to be discriminatory. However, I find it inescapable that the *effect* is discriminatory (App. 73) (emphasis added).

The court also found that because "the proposed system is in effect discriminatory, I find that such a [system] is not a bona fide seniority system" (App.

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[7] The layoff policy of the City is set forth in J.A. 82-96. The Memorandum of Understanding is set forth in J.A. 116-119.

74). In its preliminary injunction order issued on May 18, 1981, the district court enjoined the City from applying the seniority layoff policy insofar as it would decrease the percentage of blacks in certain specified positions in the Fire Department (App. 77-79).

The Sixth Circuit, in an opinion reported at 679 F.2d 541, affirmed the judgment of the district court. The court of appeals stated that a consent decree may be modified either in accordance with basic contract principles or upon changed circumstances. *Id.*, at 560-61. The court found that by the 1974 and 1980 consent decrees the City had contracted to increase the number of blacks in the Fire Department, and that the district court's order modifying the decree was designed to compel compliance with the terms and goals of the decrees. *Id.*, at 561-62. The Sixth Circuit also found that the consent decree could be modified based on new and unforeseen conditions which threatened to frustrate the purpose of the decree. *Id.*, at 562-63.

Despite the fact that the court of appeals held that "[t]he district court erred in ruling that the seniority system was non-bona fide," *id.*, at 551 n.6 and 565-66, the court determined that the district court correctly modified the consent decree to alter the seniority system over the objections of the City and the union. *Id.*, at 564-67.

SUMMARY OF ARGUMENT

The court of appeals erred in ordering the modification of a consent decree over the objection of the employer and a union in order to override a bona fide seniority system which governed the order of layoffs. Where a court has found discrimination against particular individuals, the remedial purposes of Title

VII may be fully served by awarding retroactive "rightful place" seniority to those individuals and slotting them into the existing seniority system. In the absence of a finding of intentional discrimination in the adoption or maintenance of the system or the agreement of all interested parties, however, the courts are without authority to prohibit the use of "last hired, first fired" seniority systems.

Congress intended that Section 703(h) of Title VII would immunize bona fide seniority systems from challenge under Title VII or other federal laws. The legislative history of Title VII expressly and repeatedly states that Title VII would have no effect on bona fide seniority systems. "If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII . . . even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes" 110 Cong. Rec. 7207 (1964).

The Court has recognized the "overriding importance" of seniority provisions, and that seniority systems are entitled to "special treatment" under Title VII. Seniority systems adopted both before and after Title VII and which operate to perpetuate either pre- or post-Act discrimination are not unlawful unless the system was adopted or maintained with a discriminatory intent or purpose. *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Since the district court determined that the layoff policy herein was not adopted with the intent to discriminate, the decision of the Sixth

Circuit conflicts with the express Congressional intent underlying the enactment of Section 703(h).

The reasons advanced by the court of appeals in this case do not justify the abrogation of the bona fide seniority system herein. Neither the 1974 nor the 1980 consent decree contained an express or implied obligation on the part of the City to conduct layoffs in a manner inconsistent with the express "last hired, first fired" policy negotiated with the Union. Moreover, the means chosen by the City to meet the "changed circumstances" arising from the necessity of layoffs is permitted *expressly* by Title VII. Neither Sections 1981 or 1983 nor this Court's decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1979) provide any basis for overriding the bona fide seniority system used herein.

By granting to the district court the authority to modify a consent decree over the objections of affected parties so as to override the agreemnt of the City with the Union regarding layoffs, the decision below will discourage the settlement of such employment discrimination cases in the future. Thus, the decision of the Sixth Circuit is inconsistent with the policy under Title VII favoring voluntary compliance as the preferred means of eliminating employment discrimination.

ARGUMENT

I. THE COURT BELOW EXCEEDED ITS AUTHORITY WHEN IT MODIFIED A CONSENT DECREE TO PROHIBIT LAYOFFS BASED ON A BONA FIDE SENIORITY SYSTEM, WHERE THE MODIFICATION WAS OPPOSED BY THE EMPLOYER AND THE UNION AND WHERE THERE HAD BEEN NO FINDING OF DISCRIMINATION

The court of appeals erred in ordering the modification of a consent decree in order to override a bona

fide seniority system which governed the order of layoffs. In the absence of a finding of unlawful discrimination or the consent of all interested parties, the court was without authority to modify the decree to prohibit the operation of the City's "last hired, first fired" seniority policy. The decision of the court of appeals ignores the express language of Section 703(h) of Title VII and the intent of Congress that bona fide seniority systems are to be immunized from attack under Title VII and other federal statutes prohibiting employment discrimination.

A. Section 703(h) And Its Legislative History Expressly Immunize Bona Fide Seniority Systems From Challenge

Section 703(h) of Title VII, 42 U.S.C. § 2000e-2 (h) provides, in pertinent part, as follows:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race.

It is clear from a plain reading of Section 703(h) and its legislative history, as well as from the decisions of this Court, that Section 703(h) was intended to immunize a bona fide seniority system, such as that used in the instant case, from challenge under Title VII or other federal laws.

As this Court has noted, "[t]he example of a 'seniority system' most frequently cited in the congressional debates was one that provided that the 'last hired' employee would be the 'first fired.'" *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 605 n.10

(1980). It is clear that Congress recognized that in many instances the operation of such a bona fide seniority system could have a disparate effect on more recently hired minorities. Despite this recognition, Congress nonetheless determined that the protection of a bona fide seniority system was of overriding importance.

The legislative history of Title VII is unmistakably clear that Congress intended to carve out bona fide seniority systems from the general prohibitions of Title VII. For example, Senators Clark and Case, the "bipartisan captains" responsible for Title VII in the Senate, in response to suggestions that Title VII would destroy existing seniority systems, placed an interpretive memorandum in the Congressional Record which read in part as follows:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. 110 Cong. Rec. 7213 (1964).

In addition, Senator Clark also placed in the Congressional Record a statement of the Department of Justice which read:

> First, it has been asserted that title VII would undermine vested rights of seniority. This is not

correct. *Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.* Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title. *Id.*, at 7207 (emphasis added).

Senator Clark also introduced into the Congressional Record answers to a series of questions posed by Senator Dirksen. The following question and answer is directly relevant to the instant case:

> Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?
>
> Answer. Seniority rights are in no way affected by the bill. *If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race. Id.*, at 7217 (emphasis added).

As this Court noted in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 352 (1977), these statements are "authoritative indicators" of the purpose of Section 703(h). There are numerous other statements in the legislative history which unequivocally indicate that Congress intended that the routine application of a bona fide seniority system would not be unlawful under Title VII.[8]

B. This Court Consistently Has Rejected Attacks On Bona Fide Seniority Systems

This Court has recognized on a number of occasions the "overriding importance" of seniority provisions, *Humphrey v. Moore*, 375 U.S. 335, 346 (1964); *Ford Motor Co. v. EEOC*, 102 S.Ct. 3057,

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[8] *See, e.g.*, 110 Cong. Rec. 1518 (1964) (remarks of Rep. Celler); *id.*, at 5423 (remarks of Sen. Humphrey); *id.*, at 6564 (remarks of Sen. Kuchel); *id.*, at 6565-66 (memorandum prepared by House Republican sponsors); *id.*, at 9113 (remarks of Sen. Keating); *id.*, at 11848 (remarks of Sen. Humphrey).

3070 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 76 (1982); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 766 (1976), and that seniority systems are entitled to "special treatment" under Title VII. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977). In light of the "increasing importance" of seniority systems to this country's system of employment, *Franks v. Bowman Transp. Co., Inc., supra*, 424 U.S. at 766,[9] this Court in a series of decisions has refused to override the plain meaning of Section 703(h) and the intent of Congress.

In *International Brotherhood of Teamsters v. United States, supra*, 431 U.S. at 352-53, the Court expressly acknowledged that a seniority system may have the effect of perpetuating prior discrimination. Despite this recognition, the Court held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." *Id.*, at 353-54. In so holding, this Court noted that:

> Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water

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[9] *See* S. Slichter, J. Healy, & E. Livernash, The Impact of Collective Bargaining on Management, 104-141 (1960). Seniority-based layoff provisions in both the public and private sector have proliferated because they reward service, loyalty and stability; they make for increased efficiency and safety in times of layoff; and, by securing each worker's place in the hierarchy of the organization, they improve labor relations. Moreover, they benefit all workers equally; as the most senior workers have paid their dues on layoff in years past, the least senior workers will be compensated for their time on layoff with job security in the future.

> down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act. *Id.*, at 352-53.

In *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977), decided the same day as *Teamsters*, this Court held that the operation of a bona fide seniority system is not unlawful under Title VII even though it may perpetuate post-Act discrimination that was not the subject of a timely charge. *See also American Tobacco Co. v. Patterson, supra*, 456 U.S. at 75-76; *Teamsters, supra*, 431 U.S. at 348 n.30. In *American Tobacco Co. v. Patterson, supra*, 456 U.S. at 76, this Court held that Section 703(h) immunizes seniority systems adopted before *and* after the effective date of Title VII.

Thus, where a seniority system does not have its genesis in racial discrimination, and where, as here, "it was negotiated and has been maintained free from any illegal purpose," *Teamsters, supra*, 431 U.S. at 356, the seniority system is not subject to attack simply because of its disparate effect. This Court reaffirmed in *American Tobacco Co. v. Patterson, supra*, 456 U.S. at 69-70, that a seniority system which has a disparate effect is not unlawful under Title VII unless it was adopted or maintained with a *discriminatory intent or purpose. See also Trans World Airlines, Inc. v. Hardison, supra*, 432 U.S. at 82 n.13. In addition, this Court has noted with regard to Section 703(h) that "[d]iscriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive." *Pullman-Standard v. Swint*, 456 U.S. 273, 289-90 (1982).

The district court in this case determined that the "layoff policy was not adopted with the intent or

specific purpose to discriminate" (App. 73). The district court, nonetheless, concluded that the seniority layoff system was non-bona fide because of its discriminatory effect (App. 74). The court of appeals noted that the district court's finding that the layoff policy was not adopted with a discriminatory purpose was not challenged on appeal, 679 F.2d at 551 n.6, and held that the district court had erred in its conclusion that the system was not bona fide. *Id.*, at 551 n.6 and 565-66. Thus, it is clear that the layoff policy herein was not adopted by the City with a discriminatory intent or purpose and is bona fide within the meaning of Section 703(h).[10]

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[10] The court of appeals herein declined to decide the plaintiff's contention below that *Teamsters* was inapposite because the collective bargaining agreement between the City and the Union was void and unenforceable under Tennessee law. 679 F.2d at 564 n.20. However, that issue is not relevant to the instant inquiry. This Court in *California Brewers Ass'n v. Bryant*, *supra*, 444 U.S. at 605-06, defined a "seniority system" as "a scheme that, alone or in tandem with non-'seniority' criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase" (footnotes omitted). Thus, it is clear that the layoff policy herein falls within this definition *regardless* of the enforceability of the collective bargaining agreement under Tennessee law. Since the system was adopted and applied without a discriminatory purpose, it is immunized from attack by Section 703(h). In any event, both Congress and the courts that have addressed the issue have recognized that a seniority system need not be the result of collective bargaining in order to receive the protections of Section 703(h). *See* 110 Cong. Rec. 6566 (1964) ("[T]itle VII does not permit the ordering of racial quotas in businesses or unions and does not permit interferences with seniority rights of *employees* or union members") (emphasis added); *id.*, at 11486 ("The bill does not permit the Federal Government to destroy the job seniority rights of either *union or nonunion employees*") (emphasis added); *Williams v. New Orleans*

Numerous circuit courts of appeals have given effect to the clear Congressional intent to protect bona fide seniority systems where layoffs were conducted pursuant to a "last-hired, first-fired" seniority system. *See Chance v. Board of Examiners & Bd. of Ed.*, 534 F.2d 993, 997 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Watkins v. Steel Workers of Am., Local No. 2369*, 516 F.2d 41, 49 (5th Cir. 1975); *Jersey Central Power & Light Co. v. Local Union 327*, 508 F.2d 687, 710 (3d Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1318 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).[11] *But see Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 974-75 (1st Cir. 1982), *remanded for consideration of mootness*, 51 U.S.L.W. 4566 (U.S. May 16, 1973). The decision of the Sixth Circuit in this case conflicts with the unequivocal intent of Congress and the reasoning of this Court and

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Steamship Ass'n, 673 F.2d 742, 754 n.19 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1428 (1983); *EEOC v. E.I. du Pont de Nemours & Co.*, 445 F. Supp. 223, 248 (D. Del. 1978). In addition, "if section 703(h) immunity applies exclusively to collectively bargained seniority systems, then only the 20 percent of the civilian labor force represented by labor unions would be covered by such statutory exemption." Malinowski, The *Teamsters* 703(h) Exemption: Does It Apply to Non-union Employers? 7 Empl. Rel. L. J. 210, 221 (1981).

[11] The Sixth Circuit prior to the instant case had split on the issue of whether a consent decree should be modified to prevent layoffs pursuant to seniority. *Compare Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981) *with Youngblood v. Dalzell*, 568 F.2d 506 (6th Cir. 1978). It should be noted that *Brown* did not involve allegations of discrimination under Title VII so that the court did not reach the issue of whether Section 703(h) immunized from challenge layoffs pursuant to a bona fide seniority system. 644 F.2d at 564.

the above circuit courts of appeal that a bona fide seniority system which results in an adverse effect against blacks does not violate Title VII in the absence of intentional discrimination in the adoption or maintenance of the system.

It is indisputable that minority employees often possess less seniority, and that neutral and bona fide seniority systems may have a disproportionate effect on the employment opportunities of such employees. As noted above, Congress recognized that such neutral bona fide seniority policies could have a disparate effect upon more recently hired minority members, but determined that the protection of bona fide seniority systems was of overriding importance.[12] As a resolution of these competing interests, Congress determined that discriminatees could obtain full "make whole" relief, including retroactive seniority, *Franks v. Bowman Transp. Co., Inc.*, *supra*, 424 U.S. 747, "without attacking the legality of the seniority system as applied to them." *Teamsters*, *supra*, 431 U.S. at 347. Thus, it is clear that under this Court's holdings in *Franks* and *Teamsters*, and after a hearing and appropriate findings of discrimination against particular individuals, the district court could have

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[12] Congressional deference to the rights secured by seniority systems has been recognized by this Court in a variety of contexts. *See, e.g., Trans World Airlines, Inc. v. Hardison*, *supra*, 432 U.S. 63 (requirement of § 701(j) of Title VII that employers and unions reasonably accommodate employees' religious practices, absent undue hardship, does not require abrogation of other employees' collectively-bargained seniority rights); *California Brewers Ass'n v. Bryant*, *supra*, 444 U.S. 598 (a seniority system's "ancillary rules" do not fall outside the protections of § 703(h) simply because they do not "operate on the basis of some factor involving the passage of time.")

awarded "rightful place" retroactive seniority to those individuals and slotted them into the seniority system. This would have served fully the remedial purpose of Title VII without setting aside a bona fide, neutral seniority system. In the absence of a finding of intentional discrimination in the adoption or maintenance of the seniority system, however, the court was without authority to abrogate the seniority system itself as it attempted to do herein.

As this Court noted in *Patterson*, *supra*, 456 U.S. at 76-77:

> Congress was well aware in 1964 that the overall purpose of Title VII, to eliminate discrimination in employment, inevitably would, on occasion, conflict with the policy favoring minimal supervision by courts and other governmental agencies over the substantive terms of collective bargaining agreements (citation omitted). Section 703(h) represents the balance Congress struck between the two policies, and it is not this Court's function to upset that balance (footnote omitted).

Accordingly, this Court should not interfere with the operation of the bona fide seniority provision in the instant case. *Teamsters* and its progeny clearly dictate that the "last hired, first fired" layoff policy adopted by the City is protected by Section 703(h).

II. NONE OF THE REASONS ADVANCED BY THE COURT OF APPEALS JUSTIFIES THE ABROGATION OF THE BONA FIDE SENIORITY SYSTEM HEREIN

Neither the reasons set forth by the court of appeals for the modification of the consent decree herein, nor for overriding the bona fide seniority system are persuasive. By approving the district court order,

the court of appeals ignored the plain meaning of Section 703(h) and its Congressional intent and abrogated the legitimate expectations of nonminority employees who were affected by the layoffs.

The court of appeals stated that a consent decree may be modified either in accordance with basic contract principles or upon changed circumstances. 679 F.2d at 560-61. With regard to the court's contract theory of modification, it is clear that the court did not seek merely to modify the decree to reflect the intent of the parties, but rather it undertook to rewrite the terms of the decree to achieve an objective which both the City and the Union opposed. Thus, it is clear that in the absence of a full hearing and a finding by the court of intentional discrimination in the adoption or maintenance of the seniority system, the district court was without authority to override the bona fide seniority policy.

In *United Sates v. Armour & Co.*, 402 U.S. 673, 681-82 (1971), this Court stated that consent decrees:

> cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, *the scope of a consent decree must be discerned within its four corners*, and not by reference to what might satisfy the purposes of one of the parties to it (emphasis added).

In this instance, the obligations and the intentions of the parties should be judged by reference to the "four corners" of the 1974 and 1980 consent decrees. Since the 1980 consent decree was "not intended to

conflict with any provisions" of the 1974 decree, but rather was intended to "parallel and supplement" the earlier decree (App. 60), the Court properly should look to the 1974 as well as the 1980 decrees as indicators of the parties' intent. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975).

Neither the 1974 nor the 1980 decrees provided any mechanism for layoffs, reductions in rank or recalls. The 1974 decree expressly stated that the hiring goals applicable to the Fire Department "are subject to the anticipated budgeted vacancies in the City" (J.A. 105). The 1974 decree also recognized the appropriateness of the use of city-wide seniority in the context of promotion, transfer and assignment. *Id.*, at 103. In addition, the 1980 decree provided that the "[g]oals established herein are to be interpreted as objectives which require reasonable, good faith efforts on the part of the City, and not as rigid quotas" (App. 64). The major thrust of both the 1974 and the 1980 decrees was the hiring and promotion of blacks. In this regard, approximately 56% of new hires and 16-17% of promotions since the 1974 consent decree were black (J.A. 48). The layoffs which were enjoined would have reduced the proportion of blacks in the Fire Department by only one percent (J.A. 54). Finally, the mayor testified that he would not have entered into a consent decree which provided for layoffs in a manner that was inconsistent with the union agreement herein (J.A. 37-38).[18]

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[18] In fact, the City likely would have incurred liability had it attempted to alter the collective bargaining agreement in the absence of the consent of the Union. *See W.R. Grace & Co. v. Local Union 759*, 51 U.S.L.W. 4643, 4647 (U.S. May 31, 1983).

Under these circumstances, even if a district court had the authority to modify a consent decree to abrogate a bona fide seniority policy, it simply cannot be said that there was any implied or explicit contractual obligation on the part of the City to conduct layoffs in a manner inconsistent with its express "last hired, first fired" policy. While layoffs pursuant to seniority would have entailed a modest temporary setback to the City's obligations under the decrees, this alone was not sufficient ground for overriding the seniority system.

The court of appeals' second rationale for altering the terms of the consent decree to prohibit layoffs based on seniority was that a court of equity can order such changes based on "changed circumstances." In the instant case, however, there was already in existence a mechanism to meet the "changed circumstances" arising from the necessity of layoffs—*i.e.*, the last-hired, first-fired seniority system—and that mechanism is *expressly* protected by Title VII. Thus, in the absence of a finding that the layoff policy was intentionally discriminatory, the district court was without authority to abrogate the seniority system. The fact that Section 703(h) expressly sanctions the method of layoffs used by the City renders inapposite cases where "changed circumstances" have "transformed the original decree into an instrument of wrong." 679 F.2d at 563, *citing United States* v. *Swift & Co.*, 286 U.S. 106, 114-15 (1932); *Hughes v. United States*, 342 U.S. 353 (1952).

The court of appeals' reasons for concluding that "[a] court does not abuse its discretion in modifying or approving a consent decree which conflicts with the provisions of a collective bargaining agreement," 679 F.2d at 564, all rest on the thesis that the parties

have agreed to a consent decree which contains an alteration of existing seniority provisions. Whatever validity these theories may have when the parties have agreed to such a decree, it is clear that they are wholly inapplicable when the union and the employer opposed such a modification. *See United States v. City of Miami*, 664 F.2d 435, 447, 452 (5th Cir. 1981). In the absence of agreement to the changes, a seniority provision can be altered only after an adjudication that the seniority provision was adopted or maintained with a discriminatory intent.

Sections 1981 and 1983 provide no basis for upholding the decision of the court of appeals. Since the district court expressly found that the seniority system at issue was not adopted with an intent to discriminate (App. 73), neither Sections 1981 nor 1983 could have been violated. *See, e.g., General Building Contractors Ass'n v. Pennsylvania*, 102 S.Ct. 3141, 3146-50 (1982). Since 42 U.S.C. § 1988 directs courts to enforce § 1981 "in conformity with the laws of the United States, so far as such laws are suitable," the protections afforded such seniority systems under Title VII similarly obtain under Section 1981. *See, e.g., Wattleton v. International Brotherhood of Boiler Makers*, 686 F.2d 586, 592 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 1199 (1983); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191 n.37 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471, 474 (4th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979); *Chance v. Board of Examiners & Bd. of Ed., supra*, 534 F.2d at 998; *Waters v. Wisconsin Steel Works of International Harvester Co., supra*, 502 F.2d at 1320 n.4.

Finally, the decision of the court of appeals finds no support in this Court's decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1979). Contrary to the plan in *Weber*, the instant modification of the seniority system was *not* voluntary; it would require the discharge of innocent white employees who possessed greater seniority than blacks who were retained; and it was designed to *maintain* a racial balance. Thus, the instant order fails to meet the criteria which this Court established in *Weber*, 443 U.S. at 208-09, for voluntary affirmative action plans.

Moreover, in *Ford Motor Co. v. EEOC*, *supra*, 102 S.Ct. at 3069, this Court confirmed that Title VII permits the courts to consider the rights of "innocent third parties." *See also City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 723 (1978); *Teamsters*, *supra*, 431 U.S. at 371-76. Again citing the "overriding importance" of seniority rights, this Court in *Ford* stated that "we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who had only claimed, but not yet proven, unlawful discrimination." 102 S.Ct. at 3070. In the instant case, not only have the plaintiffs not proven unlawful discrimination, but the use of a "last hired, first fired" seniority plan expressly was approved by Congress and protected by Section 703(h). Under these circumstances, the Court should not interfere with the expectations of innocent third parties and should hold that the instant seniority policy was improperly set aside by the courts below.

III. THE DECISION OF THE COURT OF APPEALS WILL DISCOURAGE THE SETTLEMENT OF EMPLOYMENT DISCRIMINATION CASES

This Court has recognized on a number of occasions that voluntary compliance is the preferred means of eliminating employment discrimination. *See, e.g., W.R. Grace & Co. v. Local Union 759, supra,* 51 U.S.L.W. at 4647; *Ford Motor Co. v. EEOC, supra,* 102 S.Ct. at 3064; *Carson v. American Brands, Inc.,* 450 U.S. 79, 88 n.14 (1981); *United Steelworkers v. Weber, supra,* 443 U.S. at 203-04; *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974); H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963); U.S. Code Cong. & Admin. News (1964), pp. 2355, 2393. In addition, employers are encouraged to " 'self-examine and self-evaluate their employment practices [under Title VII] and to eliminate, so far as possible, the last vestiges' of their discriminatory practices." *Teamsters supra,* 431 U.S. at 364. Employers thus have viewed the settlement of employment discrimination cases as not only a means of defining and perhaps limiting their potential liability, but also as a means of effecting the purposes of Title VII.

The decision of the court of appeals herein not only modified the consent decree to impose obligations on the City which were not agreed to in either the 1974 or the 1980 decrees, but it also overrode the obligation of the City under its Memorandum of Understanding with the Union regarding layoffs by seniority. By granting to the district court the authority to impose additional obligations which are not agreed to by parties to a consent decree, the decision eliminates the certainty of obligation that has proven to be a major incentive to settlement of employment discrim-

ination cases and will discourage such settlements in the future.[14]

In addition to the chilling effect which the Sixth Circuit's decision is likely to have on the willingness of employers to enter into consent decrees, it also is likely that the decision will encourage labor unions to object to the entry of consent decrees, even where their interests are not implicated directly. If consent decrees, such as those entered herein in 1974 and 1980, which related primarily to hiring and promotion and which are silent regarding layoffs, can be modified to abrogate a bona fide seniority system, it is likely that many unions will choose to oppose the entry of such decrees. This, combined with the reluctance which employers may have to enter into agreements that do not define clearly and limit their obligations, may have a detrimental effect on the settlement process and interfere with the substantial gains which minorities and women have realized through the entry of consent decrees.

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[14] Neither employers nor unions have any interest in losing minority or nonminority workers. The current economic climate and the resulting layoffs are beyond the control of any single employer, union or group of workers; the alternatives to seniority-based layoffs are not always workable organizationally; a significant majority of workers have viewed and will continue to view seniority-based layoffs as the preferred alternative; and the problem, by law, is one properly within the sphere of the collective bargaining process. As recognized by this Court, "Congress passed the Civil Rights Act of 1964 against the backrop of this Nation's long-standing labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment." *California Brewers Ass'n v. Bryant, supra,* 444 U.S. at 608.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Sixth Circuit herein should be reversed.

Respectfully submitted,

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August 19, 1983